Supreme Court, U.S.
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No. 96-134

In The

SUPREME COURT OF THE UNITED STATES

October Term 1995

Bernard Giffler,

Petitioner,

v.

Gene P Abel, N Robert Laws, Jaqueline Wolchko, John M Toth, Charled D Baker, Donna Faunce, Patricia A Cheney, Carl F Haeussler, Geryl D McMullin, Eric M Raffle, Elizabeth A Yonson,

Respondents.

Reply to Respondents' Brief in Oposition to Petioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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Destination Ventures, Ltd. v. F.C.C., 46F.3d 54 (9th Cir. 1995) 8, 9

United States Constitution Cited

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OBJECT OF THIS REPLY

This Reply was prepared to rebut respondents' STATEMENT OF THE CASE in their BRIEF IN OPPOSITION - particularly to report and condemn inaccuracies and misrepresentations that [petitioner says] were designed to falsely characterize petitioner as a dangerous lout that was using his alleged first-amendment right of free-speech to disrupt the smooth operation of subject school administration and thus to bring on him the undeserved animus of the district court.

Petitioner makes this rebuttal because he believes it has been respondents' intent [particularly Gene Abel who is the school administration's business administrator] to incite the district court to protect the school administration from the 'lout' by granting respondents' Motion For Summary Judgment as a matter of law despite the fact that respondents and court could not produce a single precedent in which a fax machine [or telephone] in a PUBLIC telecommunications system had ever been ruled to be a non-public forum, and despite the fact that their principal precedent [PERRY v. PERRY] which was used to argue that respondent's fax machine is a non-public forum did not apply in subject litigation because [if it did] we should then have to see no relevant difference between a school administration's INTERNAL mail system and that same administration's PUBLIC fax machine.

Note that petitioner calls every telephone or fax machine, that has an assigned telephone number in a public telecommunications system, a PUBLIC communications device for the reason that any member of the public who has access to such a device may legally dial-up any other such device - the same as any person on a public street may seek to communicate with any other person on that same street.

A R G U M E N T S

BRIEF IN OPPOSITION: PAGE 1, PARAGRAPH 2

The BRIEF says petitioner "claimed [a] First Amendment Right to have [subject school] district accept his messages transmitted to this particular [fax] machine whenever he chose, or, at minimum, on terms negotiated with and acceptable to him."

Petitioner says this and previous characterizations of his claim have been inflammatory and totally false. Petitioner never denied that his first-amendment right could be restricted by mutual consent or by a court of law or by an authorized regulatory agency: e.g. the FCC. Petitioner had further repeatedly argued that respondents could not [by reason of petitioner's claimed first-amendment right] force petitioner on pain of being call-blocked] to accept respondent Abel's unilateral politically inspired restrictions of his right to send faxed communications to school board members and other officials via the administration's fax machine - persons who regularly send/receive unrestricted faxed communications in this manner.

It is also significant that respondents claimed their fax machine was not a public forum for the reason that the administration did not purchase it to be a conduit for the exchange of protected speech or that it be used for any purpose that was not "official business" as defined in Abel's affidavit in respondent's Motion For Summary Judgment. Petitioner says this last claim should be irrelevant because respondents never produced a published notice of their 'official business doctrine' until months after they had call-blocked petitioner's phonelines and which even then was an off-the-cuff pronouncement authored by respondent Gene Abel, and because no one in the administration regularly reads incoming and outgoing faxed communications to determine if they

are 'official business' and to block [i.e. fail to forward] those that are not 'official'.

I [petitioner] should like also to mention that the level of respondents' mischaracterization of my claimed first-amendment right is much reduced in subject BRIEF, compared to their earlier Motion For Summary Judgment and their Brief to the Third Circuit Court of Appeals which said petitioner claimed an absolute first-amendment right to send as many communications as he chose, whenever he chose.

Abel did further wrongly say in his cited affidavit and elsewhere that Giffler [petitioner] sent voluminous quantities of his communications that would tie-up the administration's fax machine for long periods during which the administration could not use their machine for its "dedicated" official business.

These and other of Abel's statements were monstrous lies that should have been examined by a jury. That is, the district court should not have ignored petitioner's charge that they were politically inspired and may also have been a criminal attempt to obstruct justice by demeaning the petitioner and thus inciting the court to find any arguable way to stop petitioner's alleged victimization of his school administration and which may have been a subconscious reason for the court to have wrongly concluded that PERRY supported respondents' argument that THEIR fax machine was not a public forum - essentially for the reason that it had not been purchased to be used as a conduit for the expression of protected speech or for any purpose that was not "official business".

And there is still petitioner's argument that the district court could not cite a single precedent in which the owner of a telephone or fax machine was able to unarguably declare THEIR machine to be a non-public

forum for any reason, leastways to arbitrarily deny people their first-amendment right to dial-up their school administration's telephone or fax machine.

Petitioner would further argue that respondents decision to call-block his telephone lines was part of a specific plan to muzzle residents of his school district who were doing no more than to disseminate their opposition to the school board's 'school building program' that these residents believed was not needed and that was really being pushed to accelerate the residential development of their school district - which they did not want. This was also the position of petitioner who would also like to mention that the board [just before Abel began to concoct his plan to call-block petitioner] voted to eliminate the principal public-input segment of the board's public meetings because dissenting residents were using that means to promote their opposition to the school board's school building program.

It was for the above and other reasons that petitioner has claimed that respondents' decision to call-block the petitioner was politically motivated. That it was, in fact, designed to muzzle the citizenry. [Petitioner argues that the call-blocking is obviously unconstitutional .. that the elimination of public-input segments was probably not unconstitutional but that it could indicate the school board's frame of mind.]

BRIEF: PAGE 2, NEXT-TO-LAST PARAGRAPH

Respondents cite here [from the district court's OPINION] the court's conclusion that "Giffler's response to the motion for summary judgment raised no genuine issue of material fact on any relevant issue" and also that the court found that this conclusion applied to Giffler's argument that respondent Abel's affidavit lied and misled the court. Giffler's response is that the lies and misleading statements were delibe-

rate attempts to incite the court so as to predispose it to believe that petitioner victimizd respondents.

Petitioner would further argue that this inculcated predisposition of the court could account for its too ready willingness to accept respondents' flimsy arguments: e.g. that their fax machine could be self-declared to be a non-public forum [because of respondents' unargued statements that it was not purchased to be a conduit for the expression of protected speech or for any purpose that was not 'official business' - despite the fact there was no program in place to preread incoming and outgoing faxed communications to determine if they were [or were not] official and despite the fact that there was no precedent in which a public communications device had ever been found to be a non-public forum - self-declared, or not.

BRIEF IN OPPOSITION: PAGE 2, LAST PARAGRAPH

Petitioner believes the district court was in error in concluding that precedents [e.g. PERRY v. PERRY] were sufficient for it to uphold respondents' claim that their fax machine was not a public forum because of respondents' unargued claim that Giffler was the only person that did not use the administration's fax machine for whatever Abel might say after the fact is official business, and despite the fact that Giffler's faxes' recipients did never object to him [or anyone else, apparently] that his faxes violated the administration's 'official business doctrine'.

Petitioner would also add that he would have no complaint if the administration [or any organization that receives mail or faxes for employees or affiliates, preread them to determine if they were 'official business' and would refuse to forward those that were not. [The reader should understand that NO ONE CAN CALL-BLOCK MESSAGES AND READ THEM, TOO!]

BRIEF IN OPPOSITION: PAGE 3, FIRST PARAGRAPH

This paragraph, which was apparently excerpted from respondents' Motion for Summary Judgment and maybe other of respondents' briefs, tells all concerned that the subject school district has 12,500 students, over a 1000 employees and more than 16 schools. Its purpose was obviously to impress the district court with the probable volume of its faxed communications and its alleged consequent need to be certain that its "single" fax machine be kept open for the administration's important business communications.

Petitioner recalls responding that the administration's fax-load is remarkably light despite the number of its employees and schools, that he could tell because of the relatively small percentage of the times his faxed communications to the administration's machine could not be received because the machine was 'busy'. Petitioner further recalls suggesting that the administration buy a second fax machine if its current single machine is truly as busy as it says [because these machines can be very inexpensive.]

But what is interesting is the court's and respondents' reaction to this 'suggestion'. They agreed, for example, that there was no constitutional compulsion to force the administration to buy additional fax machines to be able to receive petitioner's faxes. And the court's OPINION did further suggest that petitioner's suggestion was impertinent - when all petitioner wanted to do was to debunk Abel's exaggerated claim of the inconvenience it was to receive petitioner's faxes. Also relevant to these misrepresentations is Abel's repeated assertions [in his affidavit] of the frequent patient conversations he had with petitioner on his first-amendment rights when the facts are that he hardly ever spoke to petitioner on this subject in a conciliatory tone.

That is, Abel was almost always the martinet - giving orders and threatening petitioner with call-blocking if he did not do exactly as he was ordered. [This behavior, petitioner would argue, was also politically inspired.] Petitioner, in fact, recalls suggesting in his faxletters that Abel make the same accomodation with the petitioner that the latter has now made with 8 or the 9 municipalities in his school district to whom petitioner also sent multiple-addressed copies of his faxletters.

The accomodation called for petitioner to send just one copy of his faxletters with the understanding that the municipalities would xerox and forward copies of the letters to their original intended recipients [and maybe even a few more] - the same as if they had been individually fax-addressed addressed to them.

Abel would not hear of this or any other suggestion to reduce the number of the faxes the administration was receiving. I [petitioner] could not figure out why until I saw Abel's cited affidavit in which he had included copies of what [he said] were the logs of the administration's fax machine and which did purport to indicate the number of petitioner's transmissions in each of the first five months of 1994 - but which, on examination, were not those logs but simply typed compilations of who-knows-what. [Petitioner pointed this out in his Reply to respondents Motion For Summary Judgment. He pointed out, for example, that there were no indications in the purported logs of the length of each transmission or of the time and day on which they were sent.]

The purported logs did, however, explain why Abel did never really discuss how the number of petitioner's faxes might be reduced. The answer is that Abel was plotting [months before he call-blocked petitioner] to collect statistics that could be used to persuade a court that the number of these faxes was obviously(?) excessive.

BRIEF: PAGE 3, SECOND PARAGRAPH

This paragraph says:

> the district court concluded that since the message traffic on the machine had been confined to [] day-to-day business functions, the machine had not been "opened" as a "limited public forum". The court concluded, as a matter of law, that the fax machine should be considered a "non-public forum".

Petitioner's reaction is that the court erred here for failing to acknowledge his charges that respondents' 'statement of the case' was laced with numerous gross lies and misrepresentations [mainly taken from Abel's affidavit] and petitioner's subsequent argument that the lies and misrepresentations were probably planted to pre-dispose the court to view petitioner as a lout and the school administration as his victim.

Petitioner would argue, for example, that the court should not have assumed respondents' unargued claim that Giffler was the only one whose communications were not "official business" was true in the face of the 'summary judgment standard' which requires that the court accept as true the non-movant parties' versions of contested facts. Petitioner would further argue that the court made this errror [and others in which the court did horribly misconstrue the import of PERRY v. PERRY and DESTINATION VENTURES v. FCC] because respondents lying facts had pre-disposed the court to fault the petitioner's facts and arguments as to the precedents' correct interpretations.

BRIEF: PAGE 3, NEXT-TO-LAST PARAGRAPH

This paragraph says the district court did not find Abel's restriction [that petitioner not send a fax ON ANY SUBJECT to or via the administration's machine dur-

ing its business hours] did suppress his political views.

Petitioner's reaction is that that was not his complaint per se. That is, the complaint was rather that any restriction [illegally imposed] on petitioner's right to distribute his political views would infringe his first-amendment right to gather an audiience for those views.

Petitioner would also question the BRIEF's statement that the fact that Abel's mere pronouncement that 'all communications [except petitioner's] were 'official business' was not sufficient for the court to have concluded the fax machine had not been opened as a 'limited public forum'. [And, of course, petitioner will argue that the fax machine IS an obvious public forum so that to argue whether it had been opened as a limited public forum is immaterial.]

BRIEF IN OPPOSITION: PAGE 8, FIRST PARAGRAPH

Petitioner is skipping to Page 8 of respondents' BRIEF because he he has reached the maximum number pages to which this REPLY must be limited and because he should like to comment on respondents' comment [in their BRIEF] on Petitioner's comment that the district court miscounstrued the import of DESTINATION VENTURES v. FCC, namely that the cited case is not reviewable because it deals with first-amendment rights in commercial speech which is not at issue in subject litigation.

Petitioner's comment is that the case is relevant to a degree because the District Court did say it was relevant in that it involved an advertiser who sued the FCC for banning the transmission of unsolicted faxed advertisements and because that infringed the advertiser's first-amandment right of free speech. It is thus relevant in that the ban was not applied to non-commercial speech, and In that it did not dispute the advertiser's asserted

first-amendmeent right. The result is that there would be no such ban on this petitioner's transmissions if his phoneliness were NOT in PA.

We have thus a case in which The Third Circuit Court has set a precedent that is binding on fax transmissions whose origin and destinations are in PA but that is not binding when the sender [or blockee] is not in PA. We have, in short, a case in which the rulings of two circuit courts are in conflict.

C O N C L U S I O N

Petitioner respectfully requests for the reasons discussed above that this Court reject the proposition of respondents' subject Brief in Opposition.

Respectfully submitted,

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